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Notes and Comments

TRANSEXUALS IN LIMBO: THE SEARCH FOR A LEGAL DEFINITION OF SEX

Transsexualism can be broadly defined as an obsession to belong to the opposite sex which is not practically reversible by psychological or other medical treatment. The phenomenon is not confined to Western society of the twentieth century. "Numerous descriptions from classical mythology, classical history, Renaissance, and nineteenth century history, plus many sources of cultural anthropology, point to the long-standing and widespread pervasiveness of the transsexual phenomenon."¹ Historically, the transsexual was unable to effect a physical conversion, except for castration in the case of a male.² Medical advances have, however, made a surgical sex change feasible,³ and the surgical procedures have been made available at gender identity clinics such as the one at the Johns Hopkins Medical Institutions.⁴

A sex reassignment operation may solve the transsexual's medical problem, but it is potentially the source of legal problems, because the law has not faced the question of defining an individual's sex. The paucity of legal precedents for transsexuals leaves a void that is likely to be filled with inappropriate medical or moral judgments until laws are changed or interpreted so as to recognize this human phenomenon.

MEDICAL DEVELOPMENT

A person's sex is normally determined at conception when either an X chromosome or a Y chromosome in the fertilizing sperm couples with the X chromosome present in the ovum. A female is conceived when two X chromosomes meet and a male when the combination is XY.⁵ Notwithstanding these genetic differences, both sexes are

1. Green, *Mythological, Historical and Cross-Cultural Aspects of Transsexualism*, in *TRANSEXUALISM AND SEX REASSIGNMENT* 22 (R. Green & J. Money ed. 1969).

2. Money, *Sex Reassignment*, 9 *INT'L J. PSYCHIATRY* 249 (1970-1971) [hereinafter cited as *Sex Reassignment*].

3. *Id.*

4. Money & Schwartz, *Public Opinion and Social Issues in Transsexualism: A Case Study in Medical Sociology*, in *TRANSEXUALISM AND SEX REASSIGNMENT* 267 (R. Green & J. Money ed. 1969). This comment presumes the legality of sex reassignment surgery. However, it should be noted that this issue has not been resolved by the legal profession. A recent comment, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 *CORNELL L. REV.* 963 (1971), concludes that if the patient selection and evaluation procedures conform to medical standards such an operation should be permitted.

5. J. MONEY, *SEX ERRORS OF THE BODY* 15-21 (1968) [hereinafter cited as *SEX ERRORS*].

It is possible for an error, occurring either before fertilization or in the earliest phases of cell division, to result in the wrong combination of sex chromosomes being carried by the fertilized egg. Such errors may produce mental retardation, sociopathic behavior, or impaired sexual development, including possible sterility.

identical in early embryonic development. Each embryo possesses the capability to develop all parts of both the male and female reproductive systems.⁶

Biological Defects

It is relatively simple in such a biological process for anatomical defects to occur. For example, in the male embryo, any defect in the developmental sequence may result in the child being born with external female genitalia. When this happens, the child who is chromosomally a male exhibits an external appearance which is not different from that of a normal female.⁷ A similar defect results in cases in which the internal female development is not suppressed, thereby causing the otherwise normal male to be born with a uterus and fallopian tubes.⁸ Other abnormalities may be created by the incomplete development of the external sex organs. Because of this, doctors are sometimes confronted with an ambiguity of appearance which makes it extremely difficult to determine the newborn child's sex accurately.⁹

Defects such as these not only create inconsistencies in the classification of the individual's sex, but also may lead to psychological problems. Generally the psychological sexual identity develops throughout childhood and normally corresponds to the physiological sex.¹⁰ In the majority of humans each successive step in this developmental

6. C. MOORE, EMBRYONIC SEX HORMONES AND SEXUAL DIFFERENTIATION 4 (1947) [hereinafter cited as MOORE].

7. SEX ERRORS, *supra* note 5, at 31-32.

8. *Id.* at 37.

9. *Id.* at 41.

There is a genital tubercle which could be either a large clitoris or a small penis. This organ has an open gutter underneath it instead of a covered urethral tube. The urinary orifice is at its root or base, more or less in the female position. The opening at the base may be small and lead directly to the bladder; or it may be a quite large urogenital sinus from the interior of which can be traced both the urethral and vaginal passages. The latter may either connect with the cervix of the uterus or end blindly. Outside and below the opening, it will be ambiguous whether there is a scrotum with incomplete fushion or labia majora more fused than they should have been.

Id.

10. Money lists seven variables which interact to produce the ultimate sex of the individual:

1. Chromosomal — fertilization and early zygotic proliferation as either a 46/XX female or a 46/XY male, that is a sex chromatin-positive or -negative respectively.
2. Gonadal — differentiation of the primitive gonadal ridge into either an ovary or a testis.
3. Hormonal — differentiation of hormonal function (a) in the fetus to produce feminine or masculine organizer substances, and (b) at puberty to produce either feminine or masculine secondary sexual characteristics.
4. Internal morphological — differentiation of either the müllerian or the mesonephric (wolffian) duct into the internal accessory organs of reproduction.
5. External morphological — differentiation of the external genital anlagen into either female or male sex organs.
6. Assignmental — assignment of sex at birth as either female or male, with subsequent experiences of rearing reinforcing this decision.
7. Psychosexual — differentiation after birth of a psychosexual identity as either female or male.

Money, *The Sex Chromatin and Psychosexual Differentiation*, in *THE SEX CHROMATIN* 434-35 (K. Moore ed. 1966) [hereinafter cited as *SEX CHROMATIN*].

process is consistent with the preceding ones and the psychological gender identity agrees with the sex assigned at birth.¹¹ However, where a discrepancy has occurred in any of the developmental steps, a disparity may exist between the chromosomal and psychological sex identity.¹² The transsexual, on the other hand, has appropriately paired chromosomes and genitalia and does not exhibit any discrepancy in any of the physiological developmental stages. This fact leads to the conclusion that the transsexual's identity disparity is the end product solely of an abnormal psychological differentiation.¹³

Transsexualism: A Psychological Problem

The cause of transsexualism is presently unknown. Some theorists believe the cause is organic while others feel the problem is psychogenic.¹⁴ Those who support the organic theories speculate that the genetic code system, about which little is known, may force the child to become psychologically what he is not biologically; or that a yet undiscovered hormone may act on the fetus to increase the chances of subsequent transsexual development without affecting sexual anatomy.¹⁵ The psychologists, while recognizing the possible validity of the organic theories, point out the likelihood that development of the normal gender identity has been inhibited by trauma or psychological pressure. Under either theory the conclusion is that transsexual behavior is initiated at a critical period in the process of gender differentiation, and that once this process begins it is irreversible.¹⁶

The preoperative male transsexual closely resembles both the transvestite and the effeminate homosexual. The male transsexual thinks of himself as a woman with male genitals, and because he is psychologically uncomfortable when dressed in male clothing he usually wears female attire. The transsexual, however, unlike the transvestite, receives no sexual excitement from cross-dressing, and unlike the homosexual, he conceives his attraction toward men as being heterosexual in nature. Both the homosexual and the transvestite, unlike the transsexual, consider themselves to be males and both are able to derive pleasure from the use of their genitals.¹⁷ The female trans-

11. SEX ERRORS, *supra* note 5, at 85.

12. SEX CHROMATIN, *supra* note 10, at 435.

13. It is this discrepancy which justifies, in the minds of many people, a sexual reassignment in the case of hermaphroditism, dual sexuality, but not in the case of transsexualism. Money, *Sex Reassignment as Related to Hermaphroditism*, in TRANSSEXUALISM AND SEX REASSIGNMENT 111 (R. Green & J. Money ed. 1969).

14. *Sex Reassignment*, *supra* note 2, at 251.

15. Money, *Sex Reassignment as Related to Hermaphroditism and Transsexualism*, in TRANSSEXUALISM AND SEX REASSIGNMENT 112 (R. Green & J. Money ed. 1969). It has already been established that fetal sex hormones and hormones injected into the pregnant mother do have some influence on the development of the brain. The question has been raised as to the possible effects of barbiturates and other medications taken during pregnancy on the subsequent psychosexual differentiation of the child. See also *Sex Reassignment*, *supra* note 2, at 253.

16. *Sex Reassignment*, *supra* note 2, at 253.

17. Green, *Psychiatric Management of Special Problems in Transsexualism*, in TRANSSEXUALISM AND SEX REASSIGNMENT 282-83 (R. Green & J. Money ed. 1969).

sexual exhibits behavioral patterns which parallel those of the male transsexual; that is, she feels that she is a male and emotionally and psychologically acts accordingly.¹⁸

The transsexual syndrome produces individuals who exhibit a fanatical desire to impersonate the opposite sex as well as to be rid of their natural sexual appurtenances. Not only do they wish their bodies to resemble the other sex but they also wish to live the life of the other sex, both occupationally and erotically. The transsexual is usually not responsive to any form of psychotherapy and requires surgery for social adjustment.¹⁹ After surgery, the majority of patients exhibit improvement both in their adjustment to society and in their own feelings of well-being and satisfaction.²⁰ They are able to have satisfactory sexual relations as members of their new sex although the penis in the female-to-male transsexual is unable to become erect and requires some form of support for intercourse.²¹

LEGAL PROBLEMS

Although it is almost impossible to estimate the prevalence of transsexualism, the fact that the Johns Hopkins Gender Identity Clinic received approximately 1,500 inquiries in the five-year period following its inception indicates that the number of transsexuals is by no means small.²² The existence of this transsexual population coupled with the availability of the "sex change" operation has begun to create various legal problems including the proper sex designation on official records, the right to marry, testamentary identity and criminal liability.

Sexual Identity

Of course, the law and the courts must use medical opinion and knowledge when deciding to which sex a person belongs. But the courts must also interpret and use expert opinions to serve the purposes of the law. Two courts have rendered decisions which imply that because the male-to-female transsexual is chromosomally a male he should be treated legally as a male.²³ The effect of these decisions is to treat the chromosome factor as the single criterion to be used in determining legal sex. The absurdity of this conclusion becomes apparent when one considers the complex method of sex differentiation, most of which occurs after the chromosomal coupling.²⁴ The paradox

18. Pauly, *Adult Manifestations of Female Transsexualism*, in *TRANSSEXUALISM AND SEX REASSIGNMENT* 59-87 (R. Green & J. Money ed. 1969).

19. *SEX ERRORS*, *supra* note 5, at 86-87.

20. Randell, *Preoperative and Postoperative Status of Male and Female Transsexuals*, in *TRANSSEXUALISM AND SEX REASSIGNMENT* 379 (R. Green & J. Money ed. 1969).

21. *SEX ERRORS*, *supra* note 5, at 87-88.

22. *Sex Reassignment*, *supra* note 2, at 257.

23. See *Anonymous v. Weiner*, 50 Misc. 2d 380, 270 N.Y.S.2d 319 (1966); *Corbett v. Corbett*, 2 All E.R. 33 (1970).

24. See note 10 *supra*.

created by the "chromosome test" is illustrated by a comparison of the androgen insensitive male with the male-to-female transsexual. The androgen insensitive is chromosomally a male, but because his body is unable to utilize the male hormone, androgen, he develops anatomically as a female. Because of the individual's external appearance he will be announced and registered as a female and throughout his life society will treat him as a female.²⁵ The male-to-female transsexual, as previously mentioned, is a male who, by surgical reconstruction, has acquired an external female appearance. Both the androgen insensitive and the transsexual appear to be females to the average examiner;²⁶ both believe themselves to be female;²⁷ both are able to have sexual relations with a male partner;²⁸ both require surgical treatment to engage in sexual intercourse;²⁹ and neither is able to bear children.³⁰ Since both the androgen insensitive and the transsexuals are feminine in their acts and in their appearance, it is logical that society will treat them similarly. Therefore, there is no reason for the law to treat them differently merely because medical criteria distinguish between the two.

The law, while respecting medical opinion in many areas, has never been governed by strict medical definitions when faced with countervailing social interests.³¹ For example, the adoption statutes in a majority of jurisdictions specify that an adopted child shall be deemed to be the natural child of his adoptive parents,³² yet for purposes of diagnosing hereditary diseases the child is obviously the offspring of his biological parents. Furthermore, the definition of insanity for legal purposes differs markedly from the one employed

25. Money, *Matched Pairs of Hermaphrodites: Behavioral Biology of Sexual Differentiation from Chromosomes to Gender Identity*, 33 *ENG'R & SCIENCE* 34, 35 (1970) [hereinafter cited as *Matched Pairs*].

26. Compare *SEX ERRORS*, *supra* note 5, at 32 with *In re Anonymous*, 57 Misc. 2d 813, 293 N.Y.S.2d 834 (1968).

27. Compare *Matched Pairs*, *supra* note 25, at 38 with Pauly, *Adult Manifestations of Male Transsexualism*, in *TRANSSEXUALISM AND SEX REASSIGNMENT* 58 (R. Green & J. Money ed. 1969).

28. Compare *Matched Pairs*, *supra* note 25, at 38 with Pauly, *Adult Manifestations of Male Transsexualism*, in *TRANSSEXUALISM AND SEX REASSIGNMENT* 37 (R. Green & J. Money ed. 1969).

29. Compare *SEX ERRORS*, *supra* note 5, at 32 with Pauly, *Adult Manifestations of Male Transsexualism*, in *TRANSSEXUALISM AND SEX REASSIGNMENT* 37 (R. Green & J. Money ed. 1969). Although, externally, the androgen insensitive exhibits female anatomy, the vagina is usually very short and requires surgical lengthening to permit sexual intercourse. *SEX ERRORS*, *supra* at 32.

30. Compare *SEX ERRORS*, *supra* note 5, at 32 with Green, *Psychiatric Management of Special Problems in Transsexualism*, in *TRANSSEXUALISM AND SEX REASSIGNMENT* 284 (R. Green & J. Money ed. 1969).

31. See, e.g., *Stitely v. Fleming*, 178 F. Supp. 357 (D. Md. 1959) (physical impairments of obesity and diabetes were held not to fall within the statutory definition of disability). See also 42 U.S.C. § 416(i) (1) (1964) which provides *inter alia*: "the term 'disability' means (A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" (emphasis added).

32. See, e.g., MD. ANN. CODE art. 16, § 78(a) (1966). Courts have construed similar statutes as implying that for inheritance purposes a child who has been adopted is to be treated as having never been born to her natural mother, therefore, as ineligible for the preferential tax rates reserved for lineal descendants of the deceased. *In re Estate of Jalo*, 474 P.2d 355 (Ore. 1970).

by psychiatrists for medical purposes,³³ and the legal and medical definitions of life may differ with respect to an unborn child.³⁴

The conclusion which should be drawn from these factors seems clear. Because the law is primarily concerned with human relationships, only those biological factors which influence person-to-person interactions should be criteria used in determining a person's legal sex. Medically it can be argued that in making any sexual determination the chromosomal composition and the internal anatomical structure should be taken into consideration, as well as the psychology and outward appearance of the individual. However, since only the latter two factors have any direct effect upon society, it is those factors, not microscopic cell studies, which should determine a person's legal sex.

Change Of Official Records

Because transsexualism falls within the category of behavioral patterns which society considers deviant,³⁵ the postoperative transsexual must create a new identity with as little reference to the past as possible. Many of these persons begin by attempting to effectuate a change of the sex designation listed on their birth certificates.³⁶ Several states have recently modified their statutes to permit such changes³⁷ and ten states, including Maryland, allow a change to be effected within the existing statutory provisions by administrative action.³⁸ One New York court, however, when confronted with this issue refused to permit such a change.

In the case of *Anonymous v. Weiner*,³⁹ a transsexual had requested that the Director of the New York City Board of Health change the sex designation on his birth certificate to female following a successful sexual reassignment. The Board of Health referred the problem to the New York Academy of Medicine which issued a report advising against the change of records. The Board followed the Academy's recommendation and refused to allow any alteration of the birth records. The transsexual then sought judicial relief. The court upheld the Board's decision stating that it had no authority to substitute

33. See, e.g., *Longoria v. State*, 53 Del. 311, 168 A.2d 695 (1961). The disparity between the medical and legal tests of insanity has led one observer to comment that "unfortunately, the test was formulated by lawyers without consulting medical opinion and does not take into consideration the new discoveries of psychiatry, including the role of the unconscious, the power of the emotions, the influence of delusions, or the reactions to hallucination." C. FRANKEL, 3 *LAWYERS' MEDICAL CYCLOPEDIA* § 17.15 (rev. ed. 1970).

34. See Note, *The Killing of a Viable Fetus is Murder*, 30 MD. L. REV. 137 (1970).

35. Knorr, Wolf & Meyer, *Psychiatric Evaluation of Male Transsexuals for Surgery*, in *TRANSEXUALISM AND SEX REASSIGNMENT* 272 (R. Green & J. Money ed. 1969).

36. Sherwin, *Legal Aspects of Male Transsexualism*, in *TRANSEXUALISM AND SEX REASSIGNMENT* 423 (R. Green & J. Money ed. 1969).

37. ARIZ. REV. STAT. ANN. § 36-326A4 (Supp. 1969); ILL. ANN. STAT. ch. 111½, § 73-17(1)(d) (Smith-Hurd Supp. 1971). See also LA. REV. STAT. § 40:336 (Supp. 1971) (court decree required).

38. See Report by the Committee on Public Health, The New York Academy of Medicine, *Change of Sex on Birth Certificates for Transsexuals*, 42 BULL. N.Y. ACAD. MED. 721, 723 (1966).

39. 50 Misc. 2d 380, 270 N.Y.S.2d 319 (1966).

its views for those of the Board responsible for administering the statute, unless the director had been arbitrary or capricious in his actions. The court did not expressly hold that the sex designation on a birth certificate may not be altered; however, it did commend the Academy and the Board of Health, thereby implying approval of the decision.⁴⁰

The Academy, in its report to the Board, indicated that any change in the birth certificate would destroy its evidentiary value, although the certificate could still be used for such purposes as preparing selective service registrations and passports.⁴¹ It further concluded that the desire of the transsexual to conceal his status was outweighed by society's interest in protecting the public from fraud. Although these arguments do have some validity, they are outweighed by countervailing considerations.

Although the act of assuming an identity which is both physically and psychologically that of the opposite sex may appear to some to be deceptive or fraudulent, this conduct does not meet the legal test of fraud unless it was done with the intent to deceive another for the purpose of securing an unjust advantage.⁴² Furthermore, under these circumstances, the person alleging the fraud would have to prove not only that the transsexual's original sex was material to the transaction but also that he relied upon the changed birth certificate to his detriment.⁴³ Concededly, the transsexual wants to deceive people with respect to his former sex, but this deception is not calculated to produce any unjust advantage nor is his former sex material to the majority of everyday social interactions.

40. The court stated:

When confronted with this need for a formulation of policy and possible implementation by regulation, the Board of Health, in recognition of the serious consequences attendant upon a decision in the affirmative or in the negative, initiated an exhaustive inquiry into the subject and called upon the New York Academy of Medicine to study the problem and to submit its recommendations to the Board. This recognition of the need for full exploration of the problem posed reflects the Board's awareness of its obligation to society to ensure the accuracy of public records. It also indicates its deep concern for the individual, the transsexual, who has been described by Dr. Harry Benjamin as "among the most miserable people I have ever met." [Citation omitted]. Most significant, it represents adherence to the highest standards of the administrative process.

The New York Academy of Medicine is also to be commended for assuming this delegated responsibility and for the manner in which it fulfilled its undertaking. 270 N.Y.S.2d at 321.

41. 32 C.F.R. § 1613.11 (1971) states that the selective service registrar shall obtain from the registrant all information necessary to complete the registration. 22 C.F.R. § 51.43(a) (1) (1971) provides that a birth certificate is primary evidence of citizenship or nationality, proof of which is necessary to secure a passport.

42. *Sherwood and Roberts-Kennewick, Inc. v. St. Paul Fire and Marine Ins. Co.*, 322 F.2d 70 (9th Cir. 1963).

43. *Suburban Properties Management, Inc. v. Johnson*, 236 Md. 455, 204 A.2d 326 (1964).

The elements of legal fraud are: (1) that a representation made by a party was false; (2) that either its falsity was known to that party or the misrepresentation was made with such reckless indifference to truth to impute knowledge to him; (3) that the misrepresentation was made for the purpose of defrauding some other person; (4) that that person not only relied upon the misrepresentation but had the right to rely upon it with full belief of its truth, and that he would not have done the thing from which damage resulted if it had not been made; and (5) that that person suffered damage directly resulting from the misrepresentation. 236 Md. at 460, 204 A.2d at 329.

Moreover, in those cases in which the individual's sex is material deception is more likely if society relies on the original sex designation than if it uses an amended description coinciding with the transsexual's surgically acquired sex. In cases where it is important to determine whether the person has been the subject of a sex reassignment operation a physical examination is apt to be required with no reliance being placed upon the sex designation recorded at birth.⁴⁴

Birth certificates are not, or need not be, treated as such perfect proof of a particular fact that countervailing values in having them changed can be ignored. In the law of evidence, a birth certificate is merely *prima facie* evidence⁴⁵ and is therefore rebuttable by other proof.⁴⁶ A majority of states allow new birth certificates to be issued upon proof of adoption or legitimation,⁴⁷ and some states permit issuance of a new certificate to reflect a legal change of name⁴⁸ or a successful operative sex change,⁴⁹ without questioning the probative value of the certificate as evidence.⁵⁰ It appears that the reasoning behind these rules permitting record changes is that if information contained therein is of no interest to the public and if preservation of that data might harm the individual, the records may be changed to enable the person to acquire respectability in the community.⁵¹ For example, if the parents of an illegitimate child eventually marry, the child's birth certificate will be changed so that he will be able to acquire the status of a child born in lawful wedlock.⁵² A logical extension of such reasoning would mandate similar treatment for the transsexual's records, since disclosure of transsexualism may well subject him to more harassment and ridicule than would a revelation of illegitimacy.⁵³

44. See, e.g., Army Reg. 40-501, C24, ch. 2, § IX, ¶ 2-14s (10 Nov. 1969), which provides that people who have had operative sex changes are unfit for military service. Likewise, a competitor in the Olympic Games must agree to submit to a medical examination, the purpose of which is to determine the athlete's sex. N.Y. Times, May 9, 1967, at 69, col. 4.

45. See, e.g., MD. ANN. CODE art. 43, § 26 (1971).

46. Powell v. Gleason, 50 Ariz. 542, 74 P.2d 47 (1937).

47. See, e.g., MD. ANN. CODE art. 43, § 19(b) (1971); OHIO REV. CODE ANN. §§ 3705.15, 3705.18 (Page 1971). See also AM. JUR. 2d Desk Book, Doc. No. 129 (Tabulation of States adopting the Uniform Vital Statistics Act).

48. See, e.g., KAN. STAT. ANN. § 65-2422(a) (1964).

49. See note 37 *supra* and accompanying text.

50. MD. ANN. CODE art. 43, § 19(b) (1971) permits a new certificate to be issued in cases of adoption, legitimation or adjudication of paternity yet the statute contains no provision decreasing the evidentiary value of the changed document. See MD. ANN. CODE art. 43, § 26 (1971).

51. Sklaroff v. Stevens, 84 R.I. 1, 120 A.2d 694 (1956).

52. See, e.g., MD. ANN. CODE art. 43, § 19(b)(1)(i) (1971).

53. Washington Post, May 14, 1971, § C, at 1, col. 1.

This article chronicles the treatment allegedly received by a transsexual arrested by Baltimore police. According to the victim, her car battery had gone dead and she and her friend were seeking aid when the police arrested her. After showing the officers her identification the police continued to demand that she produce her "real I.D." *Id.* at 9, col. 2. She further stated that she was undressed by a matron at the police station and that both male and female officers inspected her. In describing her experience, the transsexual said: "The men took me for a freak, something to make fun of, a circus beast or a freak." *Id.* at col. 3.

Denying these allegations, a vice squad spokesman said that inspection is not necessary. "We can usually tell they're men by their build and all. . . . I've been in this business for a long while and you ain't going to fool me." *Id.* When asked for

The Right To Marry

After successful operative sex conversions, many transsexuals have married and lived apparently normal family lives.⁵⁴ Since proof of sex is not usually required to secure a marriage license,⁵⁵ it is unlikely that legal problems will arise unless the validity of the marriage is challenged in annulment or probate proceedings.⁵⁶ Although the latter situation has yet to be reported, the former was considered in Great Britain in the case of *Corbett v. Corbett*.⁵⁷

In *Corbett*, a converted male-to-female transsexual was married to a normal male who possessed full knowledge of his spouse's sexual reassignment. Within a few weeks, a voluntary separation was agreed upon because of incompatibility. The husband then sought annulment alleging that his wife was not a woman. The court, after hearing extensive medical testimony, concluded that a person's sex is fixed at birth and is not changed by a subsequent surgical conversion. Therefore, holding that the male-to-female transsexual is not a woman for purposes of marriage, the court annulled the marriage.⁵⁸ Because of the holding in this case and its possible effect on the obligations arising out of the marriage contract,⁵⁹ it is important to consider the validity of transsexual marriages.

Although neither the common law nor modern statutes define the term marriage,⁶⁰ it is presumed to carry its ordinary meaning for all legal purposes.⁶¹ Traditionally, marriage has been understood to mean the legal union of man and woman,⁶² yet the terms male and female in the context of this relationship have never been given explicit legal

comment, Baltimore State's Attorney Milton B. Allen said that "[p]rejudice against people with what we call sexual problems is probably greater than prejudice against blacks." *Id.* at col. 4. See also N.Y. Times, Aug. 13, 1971, at 30, col. 7, which describes the plight of a fifty-two-year-old music teacher who was suspended from his tenured position when he informed the local school board that he had undergone a sex reassignment operation prior to the close of the previous school year.

54. Interview with Howard W. Jones, Jr., M.D., and John Money, Ph.D., members of the Gender Identity Clinic staff at the Johns Hopkins Medical Institutions, in Baltimore, Mar. 16, 1971. See also N.Y. Times, Aug. 13, 1971, at 30, col. 7, which chronicles some of the problems encountered by a sexually reassigned father of three who intends to continue his marriage relationship. A discussion of the validity of a marriage which pre-dates a surgical sex change, however, is beyond the scope of this comment.

55. See, e.g., MD. ANN. CODE art. 62, § 6 (Supp. 1970).

56. Cf., *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (1971). But see *Evening Sun* (Baltimore), July 24, 1971, at 1, col. 4, reporting a woman's suit against her husband for allegedly undergoing a sex change operation without her consent.

57. 2 All E.R. 33 (1970).

58. The court stated that "the law should adopt . . . the chromosomal, gonadal and genital tests [for determining the sex of the individual], and, if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention." *Id.* at 48.

59. Since the right of alimony is incident to the marriage and can not be predicated upon or granted in consequence of annulment, future support arrangements depend upon the validity of the marriage. *Staub v. Staub*, 170 Md. 202, 183 A. 605 (1936); *Yake v. Yake*, 170 Md. 75, 183 A. 555 (1936).

60. See, e.g., MD. ANN. CODE art. 62, §§ 1-19 (1968 and Supp. 1970).

61. *Maillard v. Lawrence*, 57 U.S. (16 How.) 251, 261 (1853).

62. *Dunham v. Dunham*, 162 Ill. 589, 44 N.E. 841 (1896). See also *State v. Setzer*, 226 N.C. 216, 37 S.E.2d 513 (1946).

meaning.⁶³ Therefore, the state, to prohibit a transsexual marriage, would be required either to enact an express statutory prohibition or to define the sex of the individual in such a way as to invalidate the union.⁶⁴

Although the state is justified in regulating marriage,⁶⁵ this power is limited to those aspects of marriage which might adversely affect society as a whole.⁶⁶ The state may not restrict a person's freedom to marry unless that restriction is "directed at a social evil and employs a reasonable means to prevent that evil."⁶⁷ Furthermore, the Supreme Court, in declaring Virginia's antimiscegenation statute unconstitutional, implied that unless the state had an adequate basis for denying two people the right to marry, any restrictions on their relationship would be prohibited by the fourteenth amendment's guarantee of due process of law.⁶⁸ The effect of this decision, when coupled with the

63. The term "man" as used in rape statutes means a "male of the human species of the age of 14 years and upwards." *Kenyon v. People*, 26 N.Y. 203, 211 (1863). "The word 'male' is used to denote sex and to distinguish the person or animal so described as belonging to the sex other than the female sex." *People v. McElvain*, 341 Ill. 224, 172 N.E. 131, 134 (1930).

64. The inability of either party, at the time of the marriage, to engage in sexual intercourse is sufficient to render the marriage invalid. *J.G. v. H.G.*, 33 Md. 401 (1870). However, the mere inability to procreate will not justify annulment. Thus it has been held that a divorce could not be predicated upon the fact that prior to marriage a woman underwent an operation in which her reproductive organs were removed since she was still able to have normal sexual intercourse. *Wilson v. Wilson*, 126 Pa. Super. 423, 191 A. 666 (1937). The transsexual, however, should be advised to inform his prospective spouse about his prior sexual status even though he is able to maintain a normal sexual relationship since the courts may avoid any marriage procured through fraud.

The existence of a valid marriage seems to require that the parties inform each other of all factors which are material to their union. Generally, the non-disclosure of incidental matters such as fame, fortune or temperament will not render the marriage void. However, it has been held that the concealment of any condition which will affect the health or well-being of the parties goes to the essence of the relationship, thereby justifying judicial avoidance of the marriage. *Brown v. Scott*, 140 Md. 258, 117 A. 114 (1922). In spite of this language, the fact that a party had not informed her spouse that she was infected with a venereal disease was held not to be adequate grounds for a divorce. *Koehler v. Koehler*, 137 Ark. 302, 209 S.W. 283 (1919). Furthermore, concealment of a prior marriage was not sufficient to annul a Roman Catholic marriage merely because the injured spouse suffered great mental distress. *Oswald v. Oswald*, 146 Md. 313, 126 A. 81 (1924). It therefore seems debatable whether concealment of a surgical sex change is a sufficient ground to warrant a decree of nullity. However, the existence of this uncertainty indicates that disclosure of this fact is the wiser course to follow.

65. *Maynard v. Hill*, 125 U.S. 190 (1888).

66. *Reynolds v. United States*, 98 U.S. 145 (1878). The Court, in upholding Utah's law prohibiting polygamous marriages, stated that the government has a legitimate interest in regulating marriage because "out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal." *Id.* at 165. The Court went on to say that because "polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism," it may be forbidden by law. *Id.* at 166.

67. *Perez v. Lippole*, 32 Cal. 2d 711, 198 P.2d 17, 18 (1948).

68. *Loving v. Virginia*, 388 U.S. 1 (1967). Speaking for the majority, Chief Justice Warren, after describing marriage as an essential right, stated: "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. [Citations omitted]. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes . . . is surely to deprive all the State's citizens of liberty without due process of law." *Id.* at 12.

language contained in *Meyer v. Nebraska*,⁶⁹ indicates that marriage is a constitutionally protected right of our society.

In *Shapiro v. Thompson*,⁷⁰ a landmark decision in 1969, the Supreme Court invalidated state residency requirements for persons receiving welfare on the ground that such requirements interfered with the constitutionally protected right to travel. The Court held that classifications which tend to penalize the exercise of a constitutional right can be sustained under the equal protection clause only if "necessary to promote a *compelling* governmental interest."⁷¹ Thus, since marriage is a right which enjoys constitutional protection, it would seem that a state cannot prohibit a transsexual union except to promote a compelling governmental interest.

The usual basis for denying the right to marry is the state's interest in promoting the health, safety or morals of the general public.⁷² It is this police power rationale which justifies the state in prohibiting a marriage if the union would subject either party or their offspring to the threat of contracting an infectious disease⁷³ or where medical evidence indicates that a child might inherit his parents' genetically undesirable traits.⁷⁴ Arguably, the state, as *parens patriae*, may be able constitutionally to postpone the marriage of minor children until they are better equipped to undertake such a relationship.⁷⁵ However, unless the marriage itself will adversely affect society as a whole⁷⁶ or unless the union will create a health hazard either to the spouses themselves or to yet unborn children, the state may not within the bounds of constitutionality prohibit the parties from entering into a valid marriage relationship.

69. 262 U.S. 390 (1923). The liberty contemplated by the fourteenth amendment includes the right of the individual "to marry, establish a home and bring up children." *Id.* at 399.

70. 394 U.S. 618 (1969).

71. *Id.* at 634.

72. Following *Loving v. Virginia*, state regulation of marriage appears to be subject to the same limitations as any other legitimate exercise of its police power. The police power of the state includes everything which is needed to protect the public safety, health and morals. *Lawton v. Steele*, 152 U.S. 133 (1894). To justify the state in imposing its authority it must appear that the interests of the public require the interference and that the means are reasonably necessary to accomplish the purpose and are not unduly oppressive to individuals, *State v. Boone*, 84 Ohio St. 346, 95 N.E. 924 (1911); and do not infringe upon the fundamental rights of a citizen. *Blue v. Beach*, 155 Ind. 121, 56 N.E. 89 (1900).

73. See, e.g., UTAH CODE ANN. § 30-1-2 (1969), which provides that a "person affected with syphilis or gonorrhea that is communicable or that may become communicable" is prohibited from marrying.

74. See, e.g., N.C. GEN. STAT. § 51-12 (Supp. 1967), which requires that mentally defective individuals be sterilized before a marriage license may be issued.

75. The power of the state to control children exceeds the power to control adults even where there is an invasion of constitutionally protected rights. See *Ginzberg v. New York*, 390 U.S. 629 (1968).

76. The state may not invade any protected areas under the guise of preventing activities which fall within the scope of legitimate government regulation. Therefore, even assuming that the state could legally prevent the transsexual sex reassignment by direct action, it would still be unable to discourage this operation by prohibiting the transsexual from exercising any fundamental freedoms. *Zwickler v. Koota*, 389 U.S. 241, 248 (1967).

Assuming the state can constitutionally prohibit homosexual marriages,⁷⁷ the transsexual union could be invalidated by legally fixing the person's sex at birth.⁷⁸ Under normal circumstances, the sex of the infant is determined by the attending physician based upon a superficial examination of the external genitals.⁷⁹ Since a birth defect may result in a mistaken identification it would be unwise for the state to declare unalterably that a person's sex is that determined at birth.⁸⁰ Furthermore, since the sex of an individual is initially predicated upon external appearance, there is no reason to prohibit modification of that determination if the external appearance is subsequently changed by surgical procedures.

Therefore, since a prohibition on transsexual marriages might deprive the sexually reassigned individual of the ability to maintain a legal heterosexual relationship,⁸¹ forcing the transsexual to choose between celibacy and illegality; since the transsexual marriage will have no different effect upon society from any other heterosexual marriage; and since the transsexual carries no infectious disease as a result of his surgical experience; the state has no legitimate reason for depriving the transsexual of the right to marry the person of his choice.

Estate Planning

Having undergone a successful sex reassignment operation, the transsexual may be faced with problems involving the descent and distribution of property. Although this problem has not yet been presented to the courts, a situation can be envisioned in which property is bequeathed to a person described only as "my son." If this "son" is surgically converted to a female prior to the testator's death but after the will is executed the executor may refuse to convey the property, alleging that the testator's son no longer exists. In this situation, the transsexual may be forced to seek judicial relief.

77. On the same grounds used to justify transsexual marriages, it could be argued that a homosexual marriage should be permitted. However, the language in *Reynolds v. United States*, 98 U.S. 145, 166 (1878), which prohibits polygamy because a polygamous relationship would disturb the social condition of the surrounding people, can be more easily applied to a homosexual union than to a transsexual marriage. The homosexual relationship is quite apparent and sometimes disturbing in a heterosexual environment, see Fisher, *The Sex Offender Provisions of the Proposed New Maryland Criminal Code: Should Private, Consenting Adult Homosexual Behavior Be Excluded*, 30 Md. L. Rev. 91, 97 (1970); however, the physical resemblance of the transsexual to others of his new sex would render his marriage inoffensive to the casual observer. See also *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) in which the court upheld Minnesota's ban on homosexual marriages stating that "in common sense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." *Id.* at 187.

78. The state, however, may not use this method to circumvent the constitutional prohibitions upon enacting an express statutory bar to these marriages. See note 76 *supra*.

79. Money, Potter and Stoll, *Sex Reannouncement in Hereditary Sex Deformity: Psychology and Sociology of Habilitation*, 3 Soc. Sci. & Med. 207, 207-09 (1969).

80. *Id.*

81. See, e.g., W. VA. CODE ANN. § 61-8-3 (1966), which provides that sexual intercourse between unmarried persons constitutes a misdemeanor.

The courts, in construing any will, try to ascertain and give effect to the intent of the testator as evidenced by the document itself when read in light of the circumstances surrounding its execution.⁸² In other words, the court will attempt to effectuate the dispositive plan of the testator insofar as it has been exposed in the language of the will.⁸³ Thus, if the will itself, when considered in its entirety, and if ambiguous, with extrinsic evidence,⁸⁴ clearly indicates that the testator intended that the transsexual be the recipient of his property, there is no reason why the use of the word "son" or "daughter" should thwart that result.⁸⁵ If it can be ascertained that a particular individual is the intended beneficiary, the fact that the will's gender description does not coincide with that individual's sexual identity should be of no consequence.⁸⁶ Taking another example, if a person having both male and female issue bequeathed his property to "my sons," the court

82. *In re Burleigh's Estate*, 405 Pa. 373, 175 A.2d 838 (1961).

It is now hornbook law (1) that the testator's intent is the polestar and must prevail; and (2) that his intent must be gathered from a consideration of (a) all the language contained in the four corners of his will and (b) his scheme of distribution and (c) the circumstances surrounding him at the time he made his will and (d) the existing facts; and (3) that technical rules or canons of construction should be resorted to only if the language of the will is ambiguous or conflicting or the testator's intent is for any reason uncertain [citations omitted].

Id. at 839-40. See 4 PAGE ON THE LAW OF WILLS § 30.6 (W. Bowe & D. Parker rev. 1961).

83. L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* § 462 (2d ed. 1956). *Accord*, *Whitmore v. Starks*, 17 Ill. 2d 202, 161 N.E.2d 254 (1959); *Darden v. Bright*, 173 Md. 563, 198 A. 431 (1938). See also 4 PAGE ON THE LAW OF WILLS § 32.2, at 237 (W. Bowe & D. Parker rev. 1961).

84. *Whitmore v. Starks*, 17 Ill. 2d 202, 161 N.E.2d 254 (1959); *Darden v. Bright*, 173 Md. 563, 198 A. 431 (1938). See also 4 PAGE ON THE LAW OF WILLS § 32.2, at 237 (W. Bowe & D. Parker rev. 1961).

85. See *Whittaker v. Fitzpatrick*, 268 Ky. 120, 103 S.W.2d 670 (1937). The testator devised a life estate to his son with the remainder to vest in his son's children. One of the son's children predeceased him leaving issue who, at their grandfather's death, claimed their deceased parent's share. The court held that the testator had meant to include all of his issue within the term child stating:

the words "child or children" are to be construed to mean and include grandchildren, when a reading of the will justified such conclusion, or when otherwise the testator's will would be inoperative in part, or when the statutory law requires such construction.

103 S.W.2d at 672-73. See also *Dunn v. Cory*, 56 N.J. Eq. 507, 39 A. 368 (1898). In this case, the court was asked to direct the executors in administering a will which bequeathed a sum of money "to the child of Sarah Roy." Sarah Roy's only child had died prior to the will's execution leaving surviving issue, thus presenting the question of whether, by the use of the word "child," the testator had meant "grandchild." After stating the general rule that the word "child" does not normally mean "grandchild," the court went on to hold that if, as in this case, the will itself indicates that the testator meant "grandchild" the word "child" will be construed accordingly.

86. *Barnstable v. United States Nat'l Bank*, 232 Ore. 36, 374 P.2d 386 (1962). The court in this case was asked to interpret a provision in a will which stated: "To my foster daughter, Joan I leave the sum of \$1.00." The testator's adopted daughter, Joan, contended that this provision did not refer to her and, therefore, under the Oregon statute, her father had died intestate. The court rejected this argument stating: "When the testator describes a relationship he knows did not exist . . . but identifies the object of his bounty by name, he will be deemed to have made his beneficence with a knowledge of the nonexistence of the relationship described." *Id.* at 388. See also *In re Morrison's Estate*, 106 N.H. 388, 211 A.2d 904 (1965), which stated that an erroneous description of a beneficiary is not fatal if his identity is reasonably clear. See generally 4 PAGE ON THE LAW OF WILLS § 34.38 (W. Bowe & D. Parker rev. 1961).

confronted with a transsexual heir would probably admit extrinsic evidence to explain what the testator meant by the language of the will. In this situation, the court would view the circumstances surrounding the will's execution to determine whether the testator intended specific individuals to receive his property or whether he intended that only those who were within the class of males would inherit.⁸⁷ If the court determines that the testator desired that certain individuals receive his property, the gender description used in the will should not alter this intent so as to divest the specified legatee of his share of the estate. This, of course, assumes that the transsexual remains the same "individual" that he was prior to his sexual reassignment.

On the other hand, if the court determines that the testator intended that only those offspring who are contained within the class of males receive his property, it must then ascertain at which time that class became fixed. Since the testator made some distinction between the sexes which he felt was determinative of the right to receive his property, and since once sexually reassigned the individual no longer possesses the attributes of his former sex,⁸⁸ the intent of the testator would be defeated if the male-to-female transsexual were permitted to remain within the class favored by the testator. Thus, if the class were fixed after the individual had been surgically reassigned, the transsexual should not be treated as an heir. In the converse situation, when a member of the disfavored sex is converted into one of the sex which takes under the will, the same principles should apply and the transsexual should receive a share of the estate.⁸⁹ How-

87. See *Coon v. McNelly*, 254 Ill. 39, 98 N.E. 218 (1912). In this case, the testator left his estate to "my grandchildren." The testator, however, had no grandchildren but his widow had twelve grandchildren from a prior marriage. The court in this case admitted extrinsic evidence which indicated that the testator thought of his stepchildren as being his own, stating that "for the purpose of determining the object of the testator's bounty, a court may inquire into every material fact relating to the person who claims to be interested under the will, in order to identify the person intended by the testator as a legatee." 98 N.E. at 219. See also *Nicholl v. Bergner*, 76 Ohio App. 245, 63 N.E.2d 828 (1945), which summed up the rule governing the admission of extrinsic evidence to resolve latent ambiguities in a will stating:

Where there is a latent ambiguity as to an intended beneficiary, oral declarations of a testatrix which have a bearing on the identity of the person intended are admissible in evidence. The rule is concisely stated by Chief Justice Fuller in *Coulam v. Doull*, 133 U.S. 216, 10 S. Ct. 253, 33 L. Ed. 596, in the following terms: "2. Where a devise is, on the face of it, clear and intelligible, yet from external circumstances an ambiguity arises as to which of two or more things or persons the testator referred to, it being legally certain that he intended one or the other, evidence of his declarations, of the instructions given for his will, and of other circumstances of the like nature, is admissible to determine his intention."

63 N.E.2d at 829.

88. See notes 23-34 *supra* and accompanying text.

89. It is, however, unlikely that the courts would allow a person to use the "sex-change" operation solely to bring himself within the class favored in a will and thus defeat the intent of the testator. See *Minary v. Citizens Fidelity Bank and Trust Co.*, 419 S.W.2d 340 (Ky. 1967). In this case a man adopted his wife so that upon his death she would receive the property destined to vest in his heirs. The court held that, notwithstanding statutory language which expressly provided that an adopted child be treated as a natural child for purposes of descent and distribution, a person would not be allowed to act in a manner to prevent property from passing in accord with the wishes of the testator. The court stated that "[a]doption of an adult for the

ever, in interpreting any will, it must be remembered that the rules of construction merely aid the court in reaching a decision. These rules are not inflexible, and courts have been known to come to opposite conclusions when faced with similar fact situations.⁹⁰

There may be situations in which courts might choose not to effectuate the intent of the testator. For example, if a bequest were found to be conditioned on the heir's not undergoing a surgical sex reassignment, the court would have to decide whether to ignore the condition and convey the property to the converted transsexual. Generally, the law allows a person to attach any condition to the disposition of his property as long as that condition is not illegal or in derogation of public policy.⁹¹ Thus, such a provision would be valid unless a court determined that it was against public policy to discourage a troubled transsexual from seeking medical help.

Courts will usually uphold conditions which would discourage intemperate habits⁹² or encourage the development of positive character traits.⁹³ Reasonable restraints of marriage have also been held valid. For example, restraints against marrying specific persons⁹⁴ or against marrying persons belonging to a specific class⁹⁵ have been upheld, as have restrictions upon the time at which a person may marry.⁹⁶ How-

purpose of bringing that person under the provision of a pre-existing testamentary instrument when he clearly was not intended to be so covered should not be permitted and we do not view this as doing any great violence to the intent and purpose of our adoption laws." *Id.* at 344. Extrinsic evidence would probably be admissible to show that a legatee had independent reasons for undergoing the surgical change procedure.

90. Compare *Bedinger v. Graybill*, 302 S.W.2d 594, 596 (Ky. 1957) with *Minary v. Citizens Fidelity Bank and Trust Co.*, 419 S.W.2d 340, 341 (Ky. 1967). In both of these cases, the testatrix created a trust for her children. In *Bedinger v. Graybill*, the testatrix created a trust for her son, which, upon his death, was to be distributed "to the heirs at law of my son, Robert E. Graybill, according to the Law of Descent and Distribution in force in Kentucky at the time of his death." After the testatrix had died, her son adopted his wife so that, as his heir at law, she would receive the trust estate. The court held, in a proceeding to determine to whom the property was to be distributed, that by adopting his wife the testatrix' son made her his heir at law for purposes of administration of the will. The situation in *Minary v. Citizens Fidelity Bank and Trust Co.* was substantially identical to the one presented in *Graybill*. The only difference was that in *Minary* the instrument stated that the trust was to "be distributed to my then surviving heirs, according to the laws of descent and distribution then in force in Kentucky. . . ." (Emphasis in the original). In this case, however, the court held that the adoption did not bring the wife within the class of people the testatrix intended to benefit from her will. After pointing out that in *Graybill* the term "heirs at law of Robert" was used while in this case the trust was to be distributed to "my then surviving heirs," the court distinguished the fact situations stating that the result was dependent upon the language used.

91. 5 PAGE ON THE LAW OF WILLS § 44.3, at 401 (W. Bowe & D. Parker rev. 1962).

92. See, e.g., *Griffin v. Sturges*, 131 Conn. 471, 40 A.2d 758 (1944) (provisions requiring a person to refrain from consuming alcoholic beverages); *Onderdonk v. Onderdonk*, 127 N.Y. 196, 27 N.E. 839 (1891) (prohibition on the consumption of wines, spirits or tobacco).

93. See, e.g., *Webster v. Morris*, 66 Wis. 366, 28 N.W. 353 (1886) (requirement that beneficiary learn a "useful trade, business, or profession"); *Campbell v. Clough*, 71 N.H. 181, 51 A. 668 (1901) (good habits).

94. *Graydon v. Graydon*, 23 N.J. Eq. 229 (1872); *Taylor v. Rapp*, 217 Ga. 654, 124 S.E.2d 271 (1962).

95. *Gordon v. Gordon*, 332 Mass. 197, 124 N.E.2d 228 (1955).

96. *Wise v. Crandall*, 215 S.W. 245 (Mo. 1919).

ever, a general restraint upon marriage is not considered to be in the public interest and will not be enforced.⁹⁷ The same is true of conditions which will induce separation or divorce of married couples.⁹⁸ However, although some courts invalidate gifts which attempt to influence a person's religion, other courts hold that they do not violate public policy.⁹⁹

Although it is difficult to predict the attitude of courts toward transsexual legatees, the tendency of the courts to invalidate testamentary provisions is greater when those provisions might be expected to affect society adversely. However, because society's interest in encouraging persons to seek necessary medical treatment is as fundamental as its interest in marriage,¹⁰⁰ and because transsexualism cannot be dealt with except through surgical reassignment,¹⁰¹ a court should refuse to give force to a condition barring a sexually reassigned individual from taking under a will.

Criminal Liability

The postoperative transsexual, in attempting to interact in today's society, may be the subject of a variety of criminal sanctions. Existing vagrancy statutes,¹⁰² which have been used to convict transvestites for the act of cross-dressing,¹⁰³ have allegedly been enforced against transsexuals despite the difference between them and female impersonators. Furthermore, because of their ambiguous sexual status, it appears that the transsexual's sexual activity may fall within the conduct proscribed by perverted practices statutes¹⁰⁴ which have been used to prohibit homosexual acts.¹⁰⁵ Since violation of either set of statutes depends

97. *In re Agnew's Estate*, 11 Misc. 2d 1006, 174 N.Y.S.2d 1008 (1957).

98. *In re Haight*, 51 App. Div. 310, 64 N.Y.S. 1029 (1900).

99. *Compare* *Drace v. Klinedinst*, 275 Pa. 266, 118 A. 907 (1922) with *United States Nat'l Bank of Portland v. Snodgrass*, 202 Ore. 530, 275 P.2d 860 (1954). See also 5 PAGE ON THE LAW OF WILLS § 44.28 (W. Bowe & D. Parker rev. 1962).

100. *Cf. E.P. Marriage License*, 8 Pa. D. & C.2d 598 (1957). The court, in this case, held that an epileptic should be permitted to marry notwithstanding the statutory prohibition stating:

Since the family is the basic unit of society, limitation of the epileptic's right to marry may constitute a formidable obstacle to his adjustment. Fear that legal sanctions may be invoked against marriage increases the epileptic's tension. The resulting maladjustment may add a substantial obstacle to the successful treatment of the epileptic.

Id. at 605.

101. See p. 239 *supra*.

102. N.Y. CODE CRIM. PROC. § 887 (1958) states:

The following persons are vagrants:

.....

7. a person, who, having his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified, appears in a road or public highway, or in a field, lot, wood or inclosure.

103. See, e.g., *People v. Archibald*, 58 Misc. 2d 862, 296 N.Y.S.2d 834 (1968). See also SLOVENKO, SEXUAL BEHAVIOR AND THE LAW 485 (1965); *Washington Post*, May 14, 1971, § C, at 1, col. 1, in which a transsexual states that she has been arrested several times for female impersonation.

104. See, e.g., MD. ANN. CODE art. 27, §§ 553-54 (1971).

105. Fisher, *supra* note 77, at 92.

upon the sexual identity of the accused, it becomes necessary for society to determine the transsexual's legal sex.

Statutes which currently make female impersonation a crime were originally enacted to prohibit people from disguising themselves so as to prevent identification.¹⁰⁶ Since the postoperative male transsexual appears both physically and psychologically to belong to the female sex, requiring him to wear masculine garments perpetuates the evil which the statute was designed to prevent. Therefore, if society has any interest in effectuating the principles underlying such enactments it should insist that the transsexual wear clothes befitting his physical appearance rather than those designed for members of the opposite gender.

The perverted practices statutes which have been used to prohibit homosexual conduct are derived from the common law crime of buggery.¹⁰⁷ This crime initially referred only to anal intercourse or copulation with animals,¹⁰⁸ however, modern interpretations have included oral-genital contacts within statutory prohibitions.¹⁰⁹ Furthermore, it is possible that the term "unnatural act" which is found in most statutes might be construed so as to apply to transsexual relationships.¹¹⁰ Although these laws are ripe for revision¹¹¹ and subject to constitutional attack,¹¹² they must still be contended with in most states. Nonetheless, since these statutes have never been intended to prohibit normal sexual intercourse¹¹³ it would be an aberration of justice for a person to be convicted for engaging in this act merely because of the state of his chromosomes.

Since neither of these types of statutes were intended to proscribe the transsexual's behavior and since enforcement of these prohibitions against the transsexual is inconsistent with the statutory purpose it is suggested that the threat of prosecution be eliminated by defining the legal sex of the transsexual so that it conforms with his anatomical appearance. Once the state adopts this conclusion, the transsexual will be able to assume a normal life without fearing that his everyday actions may be construed as criminal behavior.

106. See *People v. Archibald*, 58 Misc. 2d 862, 296 N.Y.S.2d 834, 837 (1968) (Markowitz, J., dissenting).

107. 25 Henry VIII, ch. 6 (1533).

108. *People v. Smith*, 117 Cal. App. 2d 698, 256 P.2d 586 (1953).

109. *Lason v. State*, 152 Fla. 440, 12 So. 2d 305 (1943).

110. *Jaquith v. Commonwealth*, 331 Mass. 431, 120 N.E.2d 189 (1954). An unnatural act has been defined to mean "irregular indulgence in sexual behavior, illicit sexual relations, and infamous conduct which is lustful, obscene, and in deviation of accepted customs and manners." 120 N.E.2d at 192. See also *Blake v. State*, 210 Md. 459, 124 A.2d 273 (1956), which indicated that the Maryland statute should not be limited by its precise language but should be read broadly so as to effect its obvious purpose.

111. See *Fisher*, *supra* note 77.

112. See *In re Labady*, 326 F. Supp. 924 (S.D.N.Y. 1924). The issue presented in this case was whether engaging in private homosexual activity with consenting adults was the type of conduct which would allow the government to deny a petition for naturalization. The court stated that private activity of this nature was harmless to the community and that "any effort to regulate or penalize the conduct may lead to an unjustified invasion of the individual's constitutional rights." *Id.* at 927.

113. States which desire to prohibit normal sexual intercourse between unmarried people have enacted fornication statutes which expressly proscribe such behavior. See, e.g., W. VA. CODE ANN. § 61-8-3 (1966).

Society's Interest

In today's society, the transsexual is in a state of sexual limbo. Physically and psychologically he appears to belong to one sex, while legally he is classified as belonging to another. This ambiguity of identity not only casts doubt upon the validity of the transsexual's marriage and subjects him to the possibility of arrest whenever he appears in public wearing the clothes of his choice, but also forces him to face potential harassment and ridicule every time he must produce official identification.¹¹⁴ The transsexual is thus set apart as he attempts to assume a productive role in society.¹¹⁵ Although his behavior is not in any way disruptive or destructive, the transsexual is subjected to legal and emotional punishment because his psychological development does not match his chromosomal makeup. Such action seems inconsistent with the Supreme Court's eloquent formulation of the right to privacy:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized man.¹¹⁶

In recognizing the importance of man's right to be let alone, some courts have ordered the expungement of arrest records because of the effect they may have on a person's future.¹¹⁷ These decisions and the statutes permitting changes in official records for certain reasons¹¹⁸ evidence a realization that the needs of society must be carefully balanced against the rights of the individual, particularly when a person's life might be impeded unnecessarily by matters relatively unimportant to society at large.

Refusal to reclassify the sex of a postoperative transsexual seems inconsistent with the principles of a society which expresses concern for the privacy and dignity of its citizens. Failure to redefine sex in

114. Federal regulations provide that to secure a passport one must present a birth certificate as proof of citizenship. 22 C.F.R. § 51.43 (1971). Furthermore, this document is also required to prove eligibility for Social Security benefits. 20 C.F.R. § 404.703 (1971).

115. Since a person must live his life in relation to various social systems, if his behavior is different from the prevailing norms of society he may find himself ostracized from traditional groupings. Jourard, *Some Psychological Aspects of Privacy*, 31 LAW & CONTEMP. PROB. 307, 308 (1966).

116. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

117. *United States v. Kalish*, 271 F. Supp. 968 (D.P.R. 1967); accord, *In re Smith*, 63 Misc. 2d 198, 310 N.Y.S.2d 617 (1970). *Contra*, *Herschel v. Dyra*, 365 F.2d 17 (7th Cir. 1966). Expungement may also be required by statute. See, e.g., CAL. PENAL CODE § 1203.45 (West 1971).

118. See notes 47-50 and accompanying text *supra*.

the case of the transsexual will create undue hardship for an otherwise troubled person.¹¹⁹ Society will lose nothing and transsexuals will gain the opportunity to lead "normal" lives if legal sex is determined not by chromosomes or anatomy at birth alone, but by present psychology and anatomy.

CONCLUSION

Today the transsexual is faced with the choice between two equally undesirable alternatives. If he chooses to live within the sex to which he was born he has, in effect, condemned himself to a perpetual masquerade. If he decides to seek medical reassignment, he subjects himself to the scorn and curiosity of society and the limbo of no legal sex identity. Both situations are appalling and are inconsistent with the professed enlightenment of our times.

Society should treat the transsexual as it would treat any other person who is suffering from a medically curable defect or disease by providing him with every procedure needed to help him achieve a productive role in the social order.

To deny the individual the right to assume under the law the identity granted him by surgery ignores a fundamental purpose of our judicial system: to regulate the interactions among people. Judicial fairness requires that society determine sex on the basis of psychological identity and anatomical appearance. Once this test is adopted, society will cease to deprive the transsexual of his fundamental rights and will enable him to undertake the peaceful pursuit of happiness.

119. Pauly, *Adult Manifestations of Male Transsexualism*, in *TRANSSEXUALISM AND SEX REASSIGNMENT* 37 (R. Green & J. Money ed. 1969).

The male transsexual is disgusted with the development of his primary and secondary sexual characteristics to the point where he frequently contemplates and occasionally performs self-mutilation of his genitalia. He prefers normal, heterosexual men as sexual partners, and rejects homosexual men or the idea that his sexual activity is homosexual. Feeling that he belongs to the female sex, he considers it appropriate to have a love relationship with a man, and he feels "unnatural" in a relationship with a woman, considering this "homosexual." There is some evidence that overt sexual activity, whether it be considered homosexual or heterosexual, plays a minor secondary role. The male transsexual may decide to pass and become accepted as a female, either before or after sex-reassignment surgery, depending upon individual circumstances. In most cases, he becomes "she" to such a convincing degree that there is no question as to the individual's femaleness. Once the transsexual becomes aware of the possibility of the change-of-sex operation, he cannot rest until he obtains this cherished goal, and he frequently becomes depressed and suicidal while trying to find medical help. *Id.* at 58. See also *Anonymous v. Weiner*, 50 Misc. 2d 380, 270 N.Y.S.2d 319, 321 (1966).